IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RALPH GROSSO, et al.	:	MISCELLANEOUS ACTION
	:	
v.	:	
	:	
SALOMON SMITH BARNEY, et al.	:	MISC. NO. 03-mc-115
	:	
	:	

MEMORANDUM

Giles, C.J. October 22, 2003

I. INTRODUCTION

Petitioners Ralph and Jacqueline Grosso, pro se, move, pursuant to 9 U.S.C.A. § 10 of the Federal Arbitration Act ("FAA"), to vacate an arbitration award rendered against them by a panel of the National Association of Securities Dealers ("NASD"). Respondents Salomon Smith Barney, Inc. ("SSB") and Steven J. Kartchner (collectively "respondents") have moved to confirm the award. For the reasons that follow, respondents' motion is granted and petitioners' motion is denied.

II. FACTUAL BACKGROUND

In September of 1995, petitioners opened an investment account with SSB and gave their stock broker, Steven Kratchner, approximately $254,000 to invest on their behalf, instructing him that their risk tolerance was "moderate." Mr. Grosso is a retired police officer and his wife is a substitute teacher. The record shows that petitioners' account prospered initially, increasing steadily in value and utilizing margin leverage to grow.[1] The value of the account peaked in late

[1]"Margin trading" is trading with borrowed funds or depositing only a portion of the funds necessary to purchase certain stock. This practice can maximize income but carries with it a higher risk of loss. An investor must pay interest on the margin account and may need to deposit additional funds if the value of stock purchased on margin drops and there is a margin

1999 then lost substantial gains that had accrued over the previous years, ultimately showing a loss by the end of 2000.

Petitioners sought to recoup their losses from the respondents and to prove their claim in a five-day hearing held before the NASD panel beginning on January 22, 2003. They asserted claims for breach of fiduciary duty, misrepresentation, failure to follow instructions, effectuating over-concentration in a select few stocks, over-extension on margin, respondeat superior and negligent supervision. The panel denied petitioners' claims in their entirety, without opinion.

Petitioner ask this court to vacate the arbitration award and remand for a hearing before a new panel of arbitrators. In support thereof, they allege that the panel: 1) manifestly disregarded the law; 2) was improperly constituted because a non-public arbitrator was chairperson; 3) engaged in misconduct by refusing to allow petitioners to amend their claim on the basis of an alleged wire transfer not credited to their brokerage account and by failing to make a complete record of the proceedings; and, 4) must have been influenced by fraud or undue means since respondents failed to produce a wire transfer as evidence in the course of discovery and at the hearing.

III. ANALYSIS

The party moving to vacate an arbitration award has the burden of proof. Carmel v. Circuit City Stores, Inc., 2000 WL 1201891, at *3 (E.D. Pa. Aug. 22, 2000). An "extremely deferential standard of judicial review [is] set forth in the Federal Arbitration Act ("FAA"), 9 U.S.C.A. § 10(a)(1)-10(a)(4)." Dluhos v. Strasberg, 321 F.3d 365, 366 (3d Cir. 2003).

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call. Failure to do so may result in involuntary liquidation of a portfolio and losses in excess of the initial investment amount.

"[A] district court may vacate [an award] only under exceedingly narrow circumstances." Id. (citing 9 U.S.C. § 10); Amalgamated Meat Cutters & Butcher Workmen of N. Am., Local 195 v. Cross Brothers Meat Packers, Inc., 518 F.2d 1113, 1121 (3d Cir. 1975). Pursuant to 9 U.S.C.A. § 10, a judge may vacate an award 1) where the award was procured by corruption, fraud, or undue means; 2) where there was evident partiality or corruption in the arbitrators . . . ; 3) where the arbitrators were guilty of misconduct and the rights of any party were thereby prejudiced; or 4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the matter before them was not made. 9 U.S.C. § 10(a)(2)-10(a)(4).

An arbitrator's decision may be vacated where the award evidences a "manifest disregard of the law." United Transp. Union Local 1589 v. Suburban Transit Corp., 51 F.3d 376, 379 (3d Cir. 1995); Kaplan v. First Options of Chicago, 19 F.3d 1503, 1520 (3d Cir. 1994); Local 863 Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Jersey Coast Egg Producers, Inc., 773 F.2d 530, 534 (3d Cir. 1985).

However, it is not proper for the court to "sit as the panel did and reexamine the evidence." Mutual Fire, Marine, & Inland Ins. Co. v. Norad Reins. Co., Ltd., 868 F.2d 52, 56 (3d Cir. 1989). Errors in the arbitrators' factual findings or interpretations of the law do not justify a court's review or reversal on the merits. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36-38 (1987); Sun Ship, Inc. v. Matson Navigation Co., 785 F.2d 59, 62 (3d Cir. 1986) (citations omitted); Whitlock Packaging Corp. v. Precision Diversified Sys., Inc., 59 F. Supp.2d 384, 390 (D.N.J. 1998). A court may not overrule an arbitrator "simply because it disagrees" with the arbitrator's interpretation of the law. United Transp., 51 F.3d at 379 (quoting

News America Publications, Inc. v. Newark Typographical Union, Local 103, 918 F.2d 21, 24 (3d Cir. 1990)). Even where the court is convinced that the arbitrator has committed serious error, the award must be enforced unless there is "absolutely no support at all in the record justifying the arbitrator's determinations." Id.; see also Tanoma Mining Co. v. Local Union No. 1269, United Mine Workers of America, 896 F.2d 745, 748 (3d Cir. 1990) (even where the support is "slender," if the record reveals "some basis for the arbitrator's conclusion . . . the inquiry is over."); Roberts & Schaefer Co. v. Local 1846, UMW, 812 F.2d 883, 885 (3d Cir. 1987) ("[e]ven when the award was dubious, and the result one that we would not have reached had the matter been submitted to the court originally, we have upheld the arbitrator's decision"); Newark Morning Ledger Co. v. Newark Typographical Union, 797 F.2d 162, 165 (3d Cir. 1986) (our "strict standard means that a reviewing court will decline to sustain an award "only in the rarest case' "); Coltec Industries, Inc. v. Elliott Turbocharger Group, Inc., Nos. Civ. A. 99-1400, 99- MC-36, 1999 WL 695870, at *4 (E.D. Pa. Sept. 9, 1999) ("The court need only find a 'colorable justification' to confirm the award.").

A. The Arbitration Panel did not Manifestly Disregard the Law

Petitioners assert that the arbitration panel manifestly disregarded the law because respondents did not diversify petitioners' portfolio, invested in risky technology stocks and "permitted" petitioners to amass substantial margin debt in clear violation of the "suitability doctrine." (Pet.'s Mem. at 15). The court disagrees.

" 'Manifest disregard of the law' encompasses situations in which it is evident from the record that the arbitrator recognized the applicable law, yet chose to ignore it." Jeffrey M. Brown Assoc., Inc. v. Allstar Drywall & Acoustics, Inc., 195 F. Supp.2d 681, 684 -685 (E.D. Pa. 2002)

(citing Aetna Casualty and Surety Co. v. Dravo Corporation, No. Civ. A. 97-149, 1997 WL 560134 at *1 (E.D. Pa. July 31, 1997)). "Other courts have held that the 'manifest disregard' principle means that the correct legal standard must have been so obvious that the typical arbitrator would readily and instantly have perceived it, the arbitrator must have been subjectively aware of that standard, and he must have proceeded to ignore that standard in fashioning the award." Id. (quoting Coltec Industries, 1999 WL 695870, at *5 (citing Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1412 (11th Cir. 1990))); Lew Lieberbaum & Co., Inc. v. Randle, 85 F. Supp.2d 123, 126 (E.D.N.Y. 2000) (To modify or vacate an award on this ground, a court must find both that 1) the arbitrators knew of a governing legal principle but refused to apply it or ignored it altogether, and 2) the "law ignored by the arbitrators . . . [was] 'well defined, explicit, and clearly applicable' " to the case.) (citation omitted).

The "suitability doctrine," alleged to have been deliberately overlooked, is premised on New York Stock Exchange Rule 405 ("Know Your Customer Rule") and Article III, Section 2 of the Rules of Fair Practice of the NASD (Suitability Rule). The Know Your Customer Rule provides that:

> Every member organization is required through a general partner, a principal executive officer or a person or persons designated under the provisions of Rule 342(b)(1) to
>
> (1) Use due diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried by such organization and every person holding power of attorney over any account accepted or carried by such organization.
>
> (2) Supervise diligently all accounts handled by registered representatives of the organization....

N.Y.S.E. Rule 405, N.Y.S.E. Guide (CCH) ¶ 2405. The Suitability Rule provides:

> In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other securities holdings and as to his financial situation and need.

NASD Manual, Rule 2310(a) (2003).

Contrary to petitioner's assertion, nothing in the record submitted by petitioners suggests that the panel deliberately ignored the suitability doctrine. The question of suitability is triggered by a recommendation from a broker. Here, testimony of petitioner at the arbitration hearing disclosed that a number of the investments alleged to have been unsuitable were actually initiated by petitioner. See (Tr. 1/22/03 at 99-100, 118-120) (testimony of petitioner pertaining to investment in shares of "Electric Arts," "Sun Microsystems," "Red Hat," and "Petsmart"); see also (Tr. 1/24/03 at 87) (testimony of Respondent Kartchner that Mrs. Grosso "gave [him] orders to buy stocks [he] never heard of"). It further appears that the petitioners might have become their own worst enemy by repeatedly calling Respondent Kartchner, sometimes before the market opened, to suggest potential stock trades based upon financial reports on CNBC, a cable network. See (Arbitration Ex. R-22); see also (Farley Aff. ¶ 6(f)); (Tr. 2/26/03 at 81) (testimony of Respondent Kartchner that Mr. Grosso was "reading and watching CNBC, following it frequently and that he gave me instructions to buy and sell.").

Respecting margin trading, the record shows that petitioners were put "on margin" at least in part through their own withdrawals from the account, for such things as personal vehicles. In addition, the following testimony was received from Respondent Kratchner at the hearing:

Q. [I]sn't it true that you recommended the use of margin in this account to purchase securities?

A. No.

Q. Then as you and I go through the statements and we will ast some point very soon, any security that you recommended the purchase of that was purchased through a margin account, it's your testimony that you did not recommend the use of margin to buy that?

A. No, that's not.

Q. Okay, please tell me then what your testimony is then with regard to the use of margin in the Grosso account.

A. Once the Grossos understood they could borrow from the account to buy stock, they wanted to continue to invest to ride the waves of posterity in the stock market. But it is true that they knew they were doing it on margins, its' the only way they could have done it as I testified before.

(Tr. 2/26/03 at 124-25).

The fact that this exchange took place before the arbitration panel is alone sufficient to confirm the award. This court cannot reassess the evidence or make judgments about witness credibility, News America, 918 F.2d at 24, and the above quoted testimony provides, at minimum, the "slender" support necessary to justify the arbitrator's decision and preclude court inquiry. See Tanoma Mining, 896 F.2d at 748.

Petitioners' assertion that the arbitrators failed to explain their decision is irrelevant since "[a]rbitrators have no obligation to the court to give their reasons for an award." Steelworkers v. Enter. Wheel Co., 363 U.S. 593, 598 (1960); see Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) ("[A]rbitrators often will not issue written opinions."). While most awards are memorialized in a written document, the FAA does not even require an arbitrator's award to be in writing. See 9 U.S.C. § 1 et seq. The failure of an arbitrator to write a formal opinion does

not support the conclusion that he manifestly disregarded the law since "it is not reasonable to attempt to draw conclusions or inferences from an arbitrator's not doing something that he was not obligated to do." Coltec Industries, 1999 WL 695870, at *5.

Petitioners' reliance upon Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998), cert. denied, 526 U.S. 1034 (1999) is misplaced. In Halligan, the Second Circuit vacated an arbitration award where there was "overwhelming evidence" supporting the petitioner's claim and counsel had explained the law to the panel. Id. at 203. In the absence of any explanation by the panel, the court was unable to reconcile the evidence in the record with the arbitration award. The Halligan court specifically acknowledged: "[W]e have stated repeatedly that arbitrators have no obligation to [explain their awards.]" Id. at 204 (citing Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972); Koch Oil, S.A. v. Transocean Gulf Oil Co., 751 F.2d 551, 554 (2d Cir. 1985); Matter of Andros Compania Maritima, S.A., (Marc Rich & Co., A.G.), 579 F.2d 691, 704 (2d Cir. 1978)). The court explained its decision as follows:

> We want to make clear that we are not holding that arbitrators should write opinions in every case or even in most cases. We merely observe that where a reviewing court is inclined to find that arbitrators manifestly disregarded the law or the evidence and that an explanation, if given, would have strained credulity, the absence of explanation may reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard.

Id.

Unlike in Halligan, the factual record in this case supports the arbitrators' award. Where an arbitrator has not set forth the specific rationale supporting the decision, the court must confirm an award if "a ground for the arbitrator[s]' decision can be inferred from the facts of the case." Willemijin Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 13

(2d Cir. 1997) (citing Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1216 (2d Cir. 1972)). From the record before the panel, the court necessarily infers that the arbitrators credited, inter alia, the testimony of Respondent Kartchner. A court cannot tamper with arbitrators' credibility determinations. Thus, the court finds that petitioners cannot meet their burden of proving that the arbitration panel manifestly disregarded the law.

B. The Arbitration Panel Was Not Improperly Constituted

Petitioners cite NASD Code of Arbitration Procedure Section 10308 and assert that the arbitration panel was improperly constituted inasmuch as the panel chairperson was the non-public or industry arbitrator. The argument is without merit.

NASD arbitration panels consist of one or three arbitrators and must have a majority of public arbitrators, unless the parties agree to a different composition. The parties have fifteen days to appoint a chairperson calculated from the date the Director of Arbitration sends notice of the names of the arbitrators appointed to serve on the panel. See NASD Code of Arbitration Procedure, Rule 10308(c)(5) (National Ass'n of Sec. Dealers, Inc. 1999). "If the parties cannot agree" on whom to appoint as chairperson, the director appoints the chairperson of the panel. Id. (emphasis added). In such a case, the director is prohibited from appointing as chairperson attorneys or other professionals who have devoted fifty percent or more of their work effort to representing investors in disputes with members of the securities industry. Id. By its terms, however, the rule is inapplicable where, as here, the parties themselves unanimously select the chairperson.

The record shows that petitioners' prior counsel and respondents' counsel communicated and jointly selected the most experienced panelist in their judgment to serve as chairperson.

Their agreement was memorialized in a fax to NASD, see (Resp.'s Cross-Mot. to Confirm Arbit. Award, Ex. D), and acknowledged in NASD's correspondence advising the parties' counsel of the chairperson's appointment. Id. at Ex. E. The notice to counsel from NASD stated that the selected chairperson was the panel's only industry arbitrator and requested written notification within five days should the case information sheet not reflect the parties' unanimous agreement.

Petitioners' argument that the panel was improperly constituted is frivolous.

C. The Arbitrators Did Not Engage in Misconduct

Petitioners assert that the arbitrators engaged in misconduct by 1) refusing to allow petitioners to amend their claim on the basis of an alleged $38,000 wire transfer not credited to their brokerage account and 2) failing to make a complete record of the proceedings. The court finds no misconduct.

A district court may vacate an arbitration award "where the arbitrators were guilty of misconduct in refusing . . . to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." 9 U.S.C.A. § 10(a)(3).[2]

1. The Alleged $38,000 Wire Transfer

Petitioners assert that the arbitrators' refusal to hear their claim that the sum of $38,000 was wired into their account but not credited by SSB was an error so egregious that it deprived them of a fundamentally fair hearing. The court disagrees.

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[2]The type of "misconduct" covered by this subsection has been construed to mean "not bad faith, but 'misbehavior though without taint of corruption or fraud, if born of indiscretion.' " Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir.1968) (quoting Stefano Berizzi Co. v. Krausz, 146 N.E. 436, 437 (1925) (Cardozo, J.)).

Decisions on evidentiary matters fall within the broad discretion of the arbitrator and "a court cannot act as a legal screen to comb the record for technical errors in the receipt or rejection of evidence by arbitrators, who in most cases are laymen." See Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir. 1968), cert. denied, 393 U.S. 954 (1968). "A fair accommodation between the words of the [FAA] and the characteristic nature of arbitration would require that such an error must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing." Id. Thus, FAA section 10(a)(3) does not mean that "every failure to receive relevant evidence constitutes misconduct which will require the vacation of an arbitrator's award." Id..

"[T]he court's function is to preserve and enforce the arbitration decision unless there is proof that--aside from the evidence presented--the decision was arrived at illegally or irregularly." Perna v. Barbieri, No. CIV. A. 97-5943, 1998 WL 181818, at *3 (E.D. Pa. Apr. 16, 1998), aff'd, 176 F.3d 472 (3d Cir. 1999). Only the most egregious error which adversely affects the rights of party constitutes "misconduct in refusing to hear evidence pertinent and material to the controversy." Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1571 (S.D.N.Y. 1987) (citing 9 U.S.C.A. § 10(a)(1)).

In Peters Fabrics, Inc. v. Jantzen, Inc., 582 F. Supp. 1287 (S.D.N.Y. 1984), the petitioner alleged that the arbitrators were guilty of misconduct in refusing to hear evidence with respect to their counterclaim. Id. at 1290. Noting that the petitioner had been given an extension of time to file an answer or counterclaim but had failed to submit a counterclaim until seven days before the hearing, the court held that the arbitrator was well within the proper scope of his discretion in refusing to consider the counterclaim. Id. at 1292.

Similarly, the record here shows that the issue of an alleged wire transfer was not part of petitioners' initial Statement of Claim but was raised for the first time during the first group of sessions conducted in January of 2002. Moreover, the arbitrators did not refuse to hear evidence relevant to the claim but rather they extended to petitioners the opportunity to amend their Statement of Claim conditioned upon the presentation of evidence to support the claimed transfer. There was a break in the proceedings. The hearing resumed in late February of 2003. At that time, petitioners' counsel notified the panel that upon inquiry to the bank in question, they were unable to locate any records documenting the alleged transfer. (Farley Aff. at ¶ 10).

Aside from their own testimony, based upon their recollection of events several years earlier, petitioners proffered no corroborating evidence that the sum of $38,000 had been wired to their account. See e.g., (Tr. 2/26/03 at 29). On these facts, the court necessarily finds that the panel's refusal to allow petitioners to amend their Statement of Claim was not error. See Hunt, 654 F. Supp. at 1495 ("pejorative charges of . . . corrupt conduct leveled at the arbitrators . . . are not a substitute for evidentiary proof" and "lacking factual support, do[] not warrant granting the [petitioners'] motion"). The arbitrators were well within the proper scope of their discretion in refusing to hear the new claim.

2. Failure to Make a Complete Recording

The arbitrators' failure to record approximately two and a half hours of testimony over the course of five days does not constitute misconduct within the meaning of 9 U.S.C.A. § 10(a)(3).

Section 10326 of the NASD Code of Arbitration Procedure provides that a "verbatim record by stenographic reporter or a tape recording of all arbitration hearings shall be kept." In

accordance with the rule, a tape recording of the proceedings in this matter was made and provided to petitioners for transcription. Without identifying any evidence or testimony submitted during the time period in issue, petitioners ask this court to infer misconduct and prejudice from the failure of the panel to record a small portion of a lengthy proceeding. The court declines to do so. See also Perna v. Barbieri, No. CIV. 97-5943, 1998 WL 181818, at *2 (E.D. Pa. Apr. 16, 1998), aff'd, 176 F.3d 472 (3d Cir. 1999) (rejecting argument that NASD tape recording was of such poor quality as to frustrate plaintiff's efforts to review proceedings and amounted to "undue means" within the meaning of 9 U.S.C.A. § 10(a)(1)).

D. The Panel's Award Was Not Procured by Fraud or Undue Means

Petitioners argue that the panel's award was procured by fraud or undue means in violation of 9 U.S.C. § 10(a)(1). Like the assertion of arbitral misconduct, this argument is premised on the alleged transfer of $38,000 into petitioners' brokerage account. The argument is without merit.

While 9 U.S.C.A. § 10(a)(3) pertains to misconduct on the part of the arbitrators, 9 U.S.C.A. § 10(a)(1) pertains to misbehavior by another party. In order to show "corruption, fraud or undue means," a plaintiff must show an occurrence that so infected the arbitration process that the result was "immoral if not illegal." Perna, 1998 WL 181818, at *2 (quoting A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 (9th Cir.1992), cert. denied, 506 U.S. 1050 (1993)). A procedural irregularity must be fundamental. Id. (citing Teamsters Local 312 v. Matlack, Inc., 118 F.3d 985, 996 (3d Cir.1997)).

In reviewing claims of "fraud" under § 10(a)(1), courts have relied upon a three-part test to determine whether an arbitration award should be vacated: 1) the plaintiff must establish fraud

by clear and convincing evidence; 2) the fraud must not have been discoverable upon the exercise of due diligence prior to or during the arbitration; and, 3) the petitioner must demonstrate that the fraud materially related to an issue in the arbitration. Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988) (citations omitted).

Courts have interpreted the "undue means" language of the statute as requiring some type of bad faith behavior by the winning party. Shearson Hayden Stone, Inc. v. Liang, 493 F. Supp. 104, 108 (N.D. Ill. 1980) (undue means requires some type of bad faith in the procurement of the award), aff'd, 653 F.2d 310 (7th Cir. 1981); see A.G. Edwards, 967 F.2d at 1404 (applying a three-part test similar to the Bonar fraud test).

In Newark Stereotypers, 397 F.2d at 598-599, petitioners attacked an arbitration award, inter alia, on the ground that they had been deprived of testimony which otherwise would have been available to it. Finding that the arbitrators had been fully aware of the claim, the Third Circuit denied relief because "[t]he award followed after a conscious judgment by the arbitrators that the panel should not undertake an investigation of the charge" and there was "no claim that the panel's conduct was corrupt or fraudulent or influenced by undue means." Id. at 599.

Petitioners have alleged that the arbitrators' decision was influenced by fraud or undue means on the part of respondents in wrongfully failing to produce the alleged wire transfer in discovery. However, petitioners have not established either fraud or undue means by any standard, let alone clear and convincing evidence.

Respondents correctly point out that the assertion that respondents failed to produce the alleged wire transfer in discovery is misleading since the issue arose for the first time during the arbitration hearing and thus there was no opportunity for discovery to have occurred on the

subject. In addition, petitioners have not explained why the wire transfer claim was never mentioned prior to the hearing or why they could not produce any records from their bank or financial institution evidencing that the funds were actually wired to SSB. Failure to produce such documentation could be taken as proof that there was never a wire transfer. Petitioners claimed that the money order was wired. Respondents denied knowledge of such a transfer, and described SSB's policies for tracking such deposits. See (Tr. 2/27/03 at 7). The matter boiled down to one of credibility. Obviously, petitioners' assertions of a wire transfer were not accepted as proof of the matter at hand.

The court has no authority to reassess witness credibility. See News America, 918 F.2d at 24 (an arbitration award may not be overturned because the court disagrees with the arbitrator's assessment of the credibility of witnesses or the weight the arbitrator has given to testimony); Kirschner v. West Co., 247 F. Supp. 550, 553 (E.D. Pa. 1965), aff'd, 353 F.2d 537 (3d Cir. 1965), cert. denied, 383 U.S. 945 (1966) ("Credibility of witnesses is always for the fact finder, and this is especially so when the fact finder is an arbitrator.").

The arbitration panel was well aware of petitioners' claim regarding the alleged transfer of funds. Respondent Kartchner testified that while petitioners had mentioned that their mother had an account which was in CDs and that they had made arrangements to "put it in an account that was invested the way the first account was invested," he could not recall being told that "the money had been wired into the account." (Tr. 2/26/03 at 79). The court infers from the denial of the amendment that the arbitrators credited the testimony of Respondent Kartchner. Petitioners' assertion that Respondent Kartchner testified in a false and misleading way is irrelevant. This court concludes that petitioners have failed to show that the award was procured by fraud or

undue means.

IV. CONCLUSION

For the foregoing reasons, petitioners' motion to vacate is denied and respondents' cross-motion to confirm is granted.

An appropriate order follows.